could not be remanded for new sentence but the judgment must be reversed with directions to dismiss the proceedings. This, of course, would result in the defendant going free, but these courts hold that the fault is in the statute and it rests with the legislature to make the alteration. As was said by Lord Tenterden in *Rex* v. *Barham,* 8 B. & C. 104; "Our decision may perhaps operate to defeat the object of the statute; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act in order to give effect to what we may suppose to be the intention of the legislature." L. W. K.

PUBLIC UTILITIES—RATES FIXED BY MUNICIPALITY UNDER POWER TO REGULATE AND FIX RATES—The principal cases dealing with the power of municipalities to contract with public service companies for service rates, and of the legislature to override such contract rates, have been considered in 19 MICHIGAN LAW REVIEW 886 and previous notes there referred to. The rules of law have been gradually evolved, with results full of surprises to the public and to the companies. The latter felt the first painful jar in what may fairly be called the leading case in this field, *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. In the more recent cases it has in general been the public that has suffered pain. Neither side has accepted punishment very gracefully, and the contest has not helped to develop that good feeling between them that is so desirable if the utility company is to prosper and the public is to be well and reasonably served. It is not the purpose of this note to refer to all of the many very recent cases as few of them make any material contribution to the subject, and these few have been considered in previous notes.

The attempt will be rather to try to state clearly such results as seem settled. That there is still room for such clear statement seems the more evident from the fact that judges continue to mis-apply the law in cases which seem so evidently governed by previous decisions that one would think that not even lawyers would argue to the contrary. Neither side seems willing to accept those results, and both continue to make contention of points which should be taken as settled unless and until the decisions are changed by statutes or constitutions. Not all the cases, of course, are so clear, but for the doubtful, clear distinctions are of great value. The doubt now rests mainly, not wholly, in the application, rather than in the statement of principles.

It is to be remarked on this whole matter that usually the golden rule would work better for both parties than any rules of law, but past experiences have bred so much suspicion as to the truthfulness and good faith of the parties, and left so much antagonism, that the public, remembering perhaps the insistence of corporations on the unreasonable advantages of franchise provisions obtained sometimes by false tampering with the representatives of the people, is now in most cases unwilling to release the corporations from any franchise provisions in its favor, even in cases where rates have become unremunerative, and involve the bankruptcy of the corporations. Perhaps this unwillingness to permit any increase in rates is because the public believes no claim made by the corporations, but certainly it can

never be well served by a corporation that is performing service at a loss. Some corporations have avoided the storm by taking the public into confidence and showing the actual condition, and many seem to be appreciating at nearer its par value the good will and confidence of the customers of a public utility.

Certain principles are too well settled to call for further citation of cases. In former notes (see 19 MICHIGAN LAW REVIEW 886), the leading cases have been discussed determining, (1) That the legislature, or the constitution, may confer on the municipality power to contract with its public service companies. (2) That such grant of power is not to be implied from general power to grant franchises, or to license use of the streets. (3) That when power to contract has been conferred on the municipality, any contract so made, though binding like any contract until modified or set aside by agreement of the parties, is after all a contract between the state and the company, and is therefore subject to the reserved right of the state in its police power, acting through the legislature or a commission clothed with such authority by the legislature, to revoke or modify the agreement without the consent of the municipality. Whether it is possible for the legislature so far to put off its function of acting for the state in the exercise of this sovereign power that it can confer upon a municipality power to contract in such manner that the legislature cannot later set aside agreements made by the city is not clear. *State* v. *Kansas City Gas Co.* 254 Mo. 515, 534. Cf. 18 MICHIGAN LAW REVIEW, 807. There is objection to the idea that any sovereign power can be irrevocably granted away by the legislature. Constitutional grants of course are not subject to recall by the legislature, or review by a commission. *Link* v. *Public Utilities Com.* (Ohio 1921) 131 N. E. 796.

That the public is far from satisfied is shown by the number of cases that continue to come up to the courts of last resort under a persistent claim that the legislature, or more often a commission, cannot set aside a rate fixed in a franchise granted by the city or in an ordinance passed by the city under its assumed power to control rates for public utilities. As stated above there may be a few cases where the power granted the municipality is irrevocable, but in nearly all cases this contention of the city is futile. *City Water Co.* v. *City of Sedalia* (Mo. 1921) 231 S. W. 942. *City of Bartlesville* v. *Corporation Comm.* (Okla. 1921) 199 Pac. 396. The interesting problems in recent cases usually involve another question, viz. whether the rate fixed is a regulation of rates, or a matter of contract. If the latter, it is binding though it may prove confiscatory; if the former, it must be remunerative or it takes property without due process. Such a rate, which has become unremunerative, is not binding on the company, even though the franchise was granted on the express condition that service should be furnished at the rates named in the franchise.

Here we may state three more settled rules. 1. Power in a city charter "to regulate charges" is no authority to enter into a contract to abandon such power to regulate. Any rate fixed by a city having such charter power may be lowered by the city, and, we are now learning, raised by the company, whenever it ceases to be a reasonable rate for the service. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. 2. The same rule applies when the city is

given power to regulate and fix rates under a provision that "these powers shall not be abridged by ordinance, resolution or contract." *Southern Iowa Electric Co.* v. *Chariton,* 41 Sup. Ct. 400. To allow a city to fix by a contract irrevocable for the franchise period the rates for service would be to abridge the power to regulate and fix the rates. And yet the district court of the United States in a recent case decided *contra,* perhaps because the above Supreme Court decision had not then been rendered. The Court of Appeals later held that the case was settled by the *Chariton* case, *supra. Central Power Co.* v. *City of Kearney,* 274 Fed. 253, (July 13, 1921). The city having power to regulate down the rate fixed, it followed that the company may regulate up, on a showing that the rate is not remunerative. Such a rate cannot be a contract rate binding the company, for the reason that it does not reciprocally bind the city. 3. The same thing follows where the city's grant of power over rates is under a provision in the Constitution of the state, to the effect that the "power to regulate rates shall not be surrendered," *City of Bartlesville* v. *Corporation Comm.* (Okla. 1921), 199 Pac. 396, or prohibiting "any irrevocable or uncontrollable grant of special privileges," etc. *City of San Antonio* v. *Public Service Co.* 41 Sup. Ct. 428. In view of this decision of the Supreme Court on April 11, 1921, it is surprising to find the district judge in *Water, Light and Power Co.* v. *City of Hot Springs, S. D.* 274 Fed. 827, decided July 13, 1921, the same day as the City of Kearney case, *supra,* holding that under such a constitutional inhibition against irrevocable grants a power "to regulate the distribution, sale and use of gas or other illuminative liquids" could fairly be inferred from the general powers given to cities by the South Dakota Statutes, and that such a power gave the city a right to enter into a binding contract for a rate irrevocable during the franchise period, but not any right of future control. It may well be doubted first whether the general language of the statutes gave cities any power to contract; second whether a power to regulate sale if specifically given includes a power to contract; and third whether under the constitutional provision against irrevocability the statutes could give any power to contract for such a fixed rate. As in the Kearney case the district judge was overruled by the Circuit Court of Appeals, so here it would seem the same fate must overtake the decision of the district judge.

E. C. G.